**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| **Delia Polanco** | § | |
| **Plaintiff** | § | **Case No.: 1:11-cv-07177-DAB-DCF** |
| **v.** | § | |
| **NCO Portfolio Management, Inc.** | § | |
| **Defendant** | | |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT NCO PORTFOLIO MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT [DE 63].**

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## I. INTRODUCTION.

Plaintiff files this Memorandum of Law in Opposition to Defendant's Motion for Summary [DE 67] ("Def. MSJ"), and in support would show as follows.

## II. PUBLIC POLICY OF THE FDCPA: PROTECTING THE LEAST SOPHISTICATED CONSUMER

Congress enacted the FDCPA in response to "evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C.A. § 1692(a). The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Accordingly, Congress enacted the FDCPA "to protect consumers from deceptive or harassing actions taken by debt collectors[,]" *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir.2002), with the purpose of "limiting the suffering and anguish often inflicted by independent debt collectors." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir.1996) (internal quotation marks omitted). "Congress painted with a broad brush in the FDCPA to protect consumers from abusive and deceptive collection practices." *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir.1989).

Congress designed the FDCPA to be enforced primarily through private parties – such as such as Ms. Polanco– acting as "private attorneys general." *See* S. Rep. No. 382, 95th Con., 1st Sess. 5 ("The committee views this legislation as primarily self-enforcing; consumers who have been subject to debt collection abuses will be enforcing compliance."); *Jacobson v. Healthcare Fin. Servs.*, 516 F.3d 85, 91 (2d Cir. 2008) ("In this way, the FDCPA enlists the efforts of sophisticated consumers like [Plaintiff] as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others.”).

The FDCPA is a strict liability statute. *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993) (‘‘The FDCPA is a strict liability statute . . . and the degree of a defendant’s culpability may only be considered in computing damages . . .”); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir.2009), *cert. denied*, 130 S. Ct. 3333, 176 L. Ed. 2d 1223 (2010) ("To recover damages under the FDCPA, a consumer does not need to show intentional conduct on the part of the debt collector.”)

## III. UNDISPUTED FACTS.

### A. Facts from DE 68, Plaintiff’s Original Local Rule 56.1 Statement of Material Fact.

There are few significant facts in dispute. Most of the following facts come from Defendant’s own deposition testimony, undisputed document production, and undisputed fact witness testimony.

On or about January 6, 2006, Defendant filed a state court collections lawsuit (“collections lawsuit”) through its debt collection law firm Mel S. Harris & Associates, LLC (“Harris”) seeking to collect on a “Retail Charge Account”. *See* DE 68 Plaintiff’s Original Local Rule 56.1 Statement of Material Fact, ¶ 1 (“hereinafter ¶__”).

The putative debt was allegedly incurred primarily for family, personal or household purposes. ¶2. The obligation was a “debt” as defined by 15 U.S.C. § 1692a(5) because the putative debt was allegedly incurred primarily for family, personal or household purposes. ¶3.

NCO Portfolio Management, Inc. (“NCO”) purchases charged off consumer accounts and attempts to collect on them, either directly themselves or indirectly through others. ¶4. NCO "purchased charged off accounts, hundreds of thousands, millions of accounts" and "placed those accounts for collections to various entities". ¶5. NCO has "literally millions of accounts". ¶6. NCO has approximately 34,000 employees. ¶7. Approximately 9,000 of NCO's 34,000 employees are debt collectors. ¶8. NCO operates in 15 countries. ¶9. NCO has millions of accounts for which it is doing collections. ¶10. NCO collects either directly or through its national network of 165 law firms. ¶11.NCO gives these 165 law firms "operating procedures they have to follow" ¶12. NCO also has its own in-house debt collection legal department and in-house debt collection attorneys. ¶13. NCO's annual revenue is $1.7 billion. ¶14. NCO has filed over 35,000 lawsuits in New York civil courts alone. ¶15.

NCO never served Ms. Polanco with the collections lawsuit. ¶16. NCO obtained a default judgment against Ms. Polanco on or about March 20, 2006 for $2,451.45 ("the default judgment"). ¶17. The default judgment obtained against Ms. Polanco on or about March 20, 2006 was based on a false affidavit of service. ¶18.

In her affidavit supporting her October 27, 2010 order to show cause, Ms. Polanco swore to specific facts supporting her claim that the process server's affidavit of merit was false. ¶19. The process server served a phantom neighbor who identified himself as Mark Jenkins, and who confirmed that Ms. Polanco was not in military service. ¶20. Ms. Polanco had no neighbor named "Mark" or "Mr. Jenkins," and had not told any of her neighbors whether or not she was in the military. ¶21.

New York City Marshal Martin Bienstock executed on the default judgment, collected on the judgment and forwarded the executed funds to NCO after taking his own fee,. ¶22-24.

Until September 2010, Ms. Polanco did not know that she had a right to seek to have a default judgment vacated. ¶25. On or about October 27, 2010, Ms. Polanco filed a pro se order to show cause to vacate the default judgment and to return the wrongfully garnished funds. ¶26. On October 27, 2010 Civil Court Judge Raul Cruz granted Ms. Polanco's order to show cause, issued an order staying all collection activities and set November 18, 2010 as the date for the hearing to vacate the default judgment. ¶27.

Harris informed NCO's in-house counsel and in-house legal department of the filing of the order October 27, 2010 order to show cause staying collections and setting a hearing on November 18, 2010 to vacate the default judgment. ¶28. NCO's in-house legal department and specifically its in-house counsel Darrell Hastings knew about the November 18, 2010 hearing to vacate the default judgment. ¶29.

Harris gave NCO contemporaneous updates regarding Plaintiff's case. ¶30. NCO took no affirmative steps through Harris to determine whether Ms. Polanco's allegations of sewer service were true. ¶31. NCO took no steps through Harris to examine the process server's service log book: ¶32 Instead, NCO asked Harris to oppose the motion to vacate judgment: ¶33.

On November 18, 2010, the Bronx Civil Court Judge Raul Cruz granted Ms. Polanco's motion, vacated the default judgment, and vacated all liens, restraining orders, and executions based on the judgment. ¶34. Judge Cruz specifically found Ms. Polanco had "shown excusable default and a meritorious defense" to the collection lawsuit. ¶35. As of November 19, 2010, or at the latest, November 26, 2010, Harris notified NCO's in-house counsel and legal department of the November 18, 2010 order vacating the default judgment. ¶36.

Ms. Polanco lives paycheck to paycheck, that is, when she can find work. ¶37. On or about May 2, 2011, Ms. Polanco needed her money back to pay for basic essentials. ¶38. On or about March 2, 2011 Ms. Polanco filed another order to show cause to have her money returned. ¶39. On March 17, 2011, the Bronx Civil Court Judge Ben R. Barbato granted Ms. Polanco's motion and issued a second order again clearly stating that the court vacated all liens, restraining orders, and executions from the vacated judgment. ¶40. On March 17, 2011, the Court also ordered NCO to "forthwith" return to Ms. Polanco any funds or fees taken from her by NCO or any agent of NCO (emphasis added) or be subject to "contempt." ¶41. An attorney for Harris was at the March 17, 2011 hearing. ¶42. Ms. Polanco also sent a copy of the March 17, 2011 order to NCO, through Harris, which was received on April 7, 2011. ¶43.

As of April 14, 2011, NCO's in-house counsel and in-house legal department had physical possession of March 17, 2011 order, which stated that NCO "shall… forthwith" return "all funds" to Ms. Polanco or be subject to "contempt." ¶44. Despite notification of the March 17, 2011 order, NCO did not release Ms. Polanco's money forthwith: ¶45. NCO admits that returning the money "forthwith," as ordered by the court, would mean to return it "right away" or within a few days. ¶46. On April 11, 2011, NCO forwarded a copy of the order to return the money to another debt collection law firm, Sharinn & Lipshie. ¶47. NCO's position is that Sharinn & Lipshie should have told NCO about information that NCO provided to Sharinn & Lipshie. ¶47. Even after receiving a dispute letter from Ms. Polanco on July 6, 2011, NCO forwarded the letter to Sharinn & Lipshie rather than returning Ms. Polanco's money forthwith. ¶48.

NCO did not return Ms. Polanco's money until August 26, 2011. ¶49. Even today, NCO's position is that it did nothing wrong and it would do the exact thing over again, even knowing what it knows now. ¶ 50.

NCO's actions inflicted damages on Ms. Polanco for personal humiliation, anger, embarrassment, shame, mental anguish, emotional distress, loss of privacy, frustration, anxiety, an inability to sleep, constant fear of being unable to pay for her most essential needs, and other distress that disrupted her activities of daily living. ¶51-52.

Ms. Polanco was unemployed for some of the period when NCO was refusing to return the money, and she desperately needed the return of her money to pay for basic essentials. ¶53. She was unable to pay rent and was subject to eviction proceedings. ¶54. She was under continuing risk of her power being shut off because of her inability to timely pay the electric bill. ¶55. She had to borrow money from a friend, and was ashamed and embarrassed in having to do so. ¶56.

After Ms. Polanco finally had her money returned, her symptoms subsided, but she still had trouble sleeping for a period of time, trying to get back into her rhythm from all of the stress and anxiety inflicted by NCO. ¶57.

### B. Additional facts from Plaintiff's Rule 56.1 Counter Statement of Material Facts.

Defendant's counsel has already admitted in deposition that Defendant is not contesting liability. Pl. 56.1 Counterstatement ¶ C1.

Despite the new position it took in its motion for summary judgment, Defendant's corporate representative. Michael Noah, has already testified that the entities "NCO Financial Systems" and "NCO Portfolio Management" are essentially one and the same in regards to the conduct which forms the basis of this lawsuit. *Id.* ¶ C2. Therefore, the conduct to which Mr. Noah testified to, *Id.* ¶ C3, applies to both.

Importantly, despite the reference repeatedly in Defendant's motion for summary judgment to NCO Financial Services, Inc. (NCOF), the only pertinent summary judgment *evidence* is the testimony of Mr. Noah. Not only did Mr. Noah not make such a distinction, he did the exact opposite, testifying that "NCO Financial Systems" (NCOF) and "NCO Portfolio

Management" NCOP were the same entity for purposes of this lawsuit. *Id.* C3. NCOFS is the "main collection arm" of NCOP. *Id.*

Despite the suggestion of Mr. Noah to the contrary, the testimony of counsel for Sharinn & Liphsie makes clear that firm did not represent Defendant as to Ms. Polanco's account. *Id.* ¶ C4. Lastly, Defendant testified that it if Ms. Polanco had not written a dispute letter to the credit reporting agencies in July, 2011, Defendant would not have returned her money at all, let alone "forthwith." *Id.* ¶ C5.

## IV. ARGUMENT

### A. RESPONSE TO POINT I: Defendant's argument as to an abandonment of actual damages depriving the Court of jurisdiction is mooted by Your Honor's January 26, 2015 order [DE 75]

By Order of January 26, 2015, Your Honor has ruled that the existing First Amended Complaint does not abandon Plaintiff's claim for actual damages, and thus that, "Defendant's argument that the absence of a claim for actual damages under the FDCPA would divest this Court of subject matter jurisdiction is moot." [DE 75 p. 3]

Further, as explained in the prior few paragraphs, the undisputed summary judgment evidence is that that Ms. Polanco suffered significant garden-variety emotional distress damages, the value for which is a question for the jury. *Abel v. Town Sports Int'l, LLC*, 09 CIV. 10388 DF, 2012 WL 6720919 (S.D.N.Y. 2012) (M.J. Freeman)("In garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. Such claims typically lack [ ] extraordinary circumstances and are not supported by any medical corroboration.")

**B. RESPONSE TO POINTS II: NCOP is directly liable as the party in the collection lawsuit, and vicariously liable for the wrongful acts of its servicer and debt collection law firm.**

**1. Defendant has already indicated it was not contesting liability.**

Defendant's counsel has already admitted in deposition that Defendant is not contesting liability. Pl. 56.1 Counterstatement ¶ C1. Therefore, Defendant's motion for summary judgment should be denied out of hand.

**2.While not necessary to establish liability for NCOP, its corporate representative testified that NCOP and NCOF were jointly liable for the purposes of this lawsuit, and that the acts he described in his testimony could be attributed to both.**

Importantly, despite the reference repeatedly in Defendant's motion for summary judgment to NCO Financial Services, Inc. (NCOF), the only pertinent summary judgment *evidence* is the testimony of Mr. Noah. Not only did Mr. Noah not make such a distinction, he did the exact opposite, testifying that "NCO Financial Systems" (NCOF) and "NCO Portfolio Management" NCOP were the same entity for purposes of this lawsuit. *Id*. C3. NCOFS is the "main collection arm" of NCOP. *Id*. Specifically, he testified:

Q. Are these the deposition notices for which you're here to testify?
A. Yes.
Q. And you're here to testify on behalf of both NCO Portfolio and NCO Financial; correct?
A. Correct.
Q. Okay. Let me just get some of the acronyms, the initials down. First of all, what is NCO Financial?
**A. It's one of the -- that's the main collection agency of NCO, it's really -- it has several subsidiaries under it, but it's the main collection arm. The accounts receivable collection.**
Well, just for shorthand

> purposes, let me ask you if this is a fair statement.
> **NCO Portfolio Management and NCO Financial Systems are essentially the same entity for the purposes of attempting to collect a debt as to my client, Ms. Polanco. Is that a fair statement?**
> **A. For this case; yes.. . .**

Pl. 56.1 Counterstatement ¶ 3. *See* [DE 69-4, Exh D. Keshavarz Dec. Noah Tr., pp. 11:22-12:21].

Also, despite the suggestion that in Mr. Noah's deposition that Defendant was waiting for Sharinn & Liphsie (S&L) to tell it what to do in response to the order to return Ms. Moreno's money "forthwith," Amanda Moreno, the attorney at S&L, testified that S&L did not represent Defendant regarding Ms. Polanco's account because it was waiting for a consent to change attorney form. Pl. 56.1 Counterstatement ¶ 4.:

> Q. What were you supposed to do for NCO when NCO forwarded you Ms. Polanco's account in January of 2011?
> A. We couldn't do anything with it, because we requested a consent to change attorney
> 40
> and we never received it.
> Q. When you say you couldn't do anything, what do you mean, you couldn't do anything?
> A. We were not attorney of record. We could not work the file. It was transferred to us and it sat. We did not work the file, we did not try to collect any debt on the file, it sat in a holding queue.
> Q. Any other reason why Sharinn & Lipshie didn't do anything with the file?
> A. We were not attorney of record. We had no basis to do anything with the account.
> Q. Any other reason?
> A. We didn't have complete records.
> Q. Any other reason?
> A. No.

> *See* Exh. B, January 17, 2014 Deposition Transcript of Amanda Moreno ("Moreno Tr."), pp. 39:21 to 40:17.

Defendant testified that it if Ms. Polanco had not written a dispute letter to the credit reporting agencies in July, 2011, Defendant would not have returned her money at all, let alone "forthwith." *Id.* ¶ C5.

Based on the summary judgment testimony of Defendant's corporate representative, Defendant was involved every step of the way from the time period of the filing of the order to show cause to its refusal for several months to comply with an order forthwith. Also, Defendant's argument that it needed to hear back from attorney S&L before taking any steps is difficult to understand. The order was crystal: it ordered the then-Plaintiff (NCOP) and its agents to return Ms. Polanco's money "forthwith." There is no ambiguity as to what NCO's obligation was.

**3.More importantly, however, NCOP is directly liable as the party in the collection lawsuit, and vicariously liable for the wrongful acts of its servicer and debt collection law firm.**

The fact pattern in the case at bar is unusual. Here the creditor (or, according to Defendant now, the creditor's "debt collection arm") appears to be involved every step of the way beginning with the filing of the order to show cause. The more common scenario is when a debt collector creditor sends a large number of accounts to a debt collection law firm, which, in representing the creditor, violates the FDCPA. *See e.g. Sykes, Diaz, Fritz*, cited below.

It is important to remember, that even if NCOP had *no* involvement in the collection of the debt other than forwarding Ms. Polanco's account to another collector to collect on NCOP's behalf, NCOP would still be entirely liable. In her own moving papers affirmatively seeking summary judgment [DE 67, "Pl. MSJ" pp. 8, 9, 15-17], Plaintiff provides authority as to why NCOP is a debt collector, and is directly and vicariously liable for the FDCPA actions in the collection lawsuit. The FDCPA violations include, inter alia, 1) falsifying an affidavit of service to obtain a default judgment against Ms. Polanco, and then 2) refusing to comply for several months with an order that Defendant return Ms. Polanco's money "forthwith."

Rather than restate her legal argument articulated in her own moving papers, Plaintiff will simply incorporate by reference those section, [DE 67, "Pl. MSJ" pp. 8, 9, 15-17], and her simply focus on a few issues raised (or ignored) in NCOP's motion for summary judgment.

NCOP makes the remarkable argument that it is not a debt collector even though it admits it purchased the Polanco account after default. Where a creditor admitted it purchased an account after default, a court in the ED NY found the creditor's argument that it was not a debt collector "not only meritless, but border[ing] on the sanctionable." *Hamlett v. Santander Consumer USA Inc.*, 931 F. Supp. 2d 451, 455 (E.D.N.Y. 2013). The Court held that, "while it is true that the FDCPA excludes creditors from the definition of debt collector, it is well established that "an assignee of a debt that is in default at the time the debt was obtained is considered a debt collector for purposes of the FDCPA."" *Id., quoting Larsen v. JBC Legal Group, P.C.*, 533 F.Supp.2d 290, 300–301 (E.D.N.Y.2008).

In support of its position that it not a debt collector, Defendant cites a single out of state district court opinion. *Kasalo v. Trident Asset Mgmt., LLC*, No. 12 C 2900, 2014 WL 3056821 (N.D. Ill. July 7, 2014). *Kasalo* sidesteps the issue of vicarious liability of a debt buyer that merely hires another debt collector to collect on its behalf, but otherwise takes no direct steps to collect the debt. Instead of ruling whether the debt buyer was vicariously liable, which it was bound to do under Seventh Circuit precedent, the Court challenged the predicate that the debt buyer was a debt collector. The Court conceded, as it was required to under precedent, that the debt buyer met the first element definition of a debt collector because it purchased the debt after default. However, the Court then held the debt buyer was not "collect[ing] or attempt[ing] to collect, directly or indirectly" because it hired another debt collector to collect on its behalf. *Id.* at * 3 *quoting in part* 15 U.S.C. § 1692a(6) (definition of debt collector). The Court reasoned:

> Kasalo alleges no action on the part of OPS other than hiring Trident; Kasalo does not allege that OPS drafted anything that was sent to Kasalo or took any action toward him. Neither party, in fact, offers a case with a factual scenario like this one, in which a party alleged to be a "debt collector" hired a third party to collect a debt it acquired post-default but did not take any actions itself toward the debtor.
>
> An entity that acquires a consumer's debt hoping to collect it but that does not have any interaction with the consumer itself does not necessarily undertake activities that fall within this purview.
>
> *Kasalo* at *3.

*Kasalo* however this view ignores the text of the statute. By stating the debt buyer "did not take any actions *itself* toward the debtor," Id. (emphasis added), *Kasalo* is only considering whether the debt buyer is "directly" attempting to collect the debt. *Kasalo* is wrong because ignores that the definition of a debt collector also includes one who "*indirectly*" attempts to collect a debt, a term that Congress must have included for a purpose. *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1146 (9th Cir. 1998)("Although the term, "indirectly," is not defined in the statute, the legislative history, or the case law, its inclusion in the FDCPA must be taken into account.")(holding Western Union's system that "obtains debtors' telephone numbers by eliciting responses to personal delivery telegrams, then disseminates the unlisted numbers to creditors and collection agencies" may make it a debt collector). In *Alonso v. Blackstone Fin. Group L.L.C.*, 962 F.Supp.2d 1188 (E.D. Cal. Aug. 2, 2013), the court refused to dismiss the claim against an individual officer who did not participate directly in collection, since the allegations of authority, control, managerial activities and responsibilities were sufficient to establish that he indirectly participated in debt collection. "The FDCPA's broad definition of debt collector evinces an intent to broadly impose liability on person who are directly or indirectly involved in debt collection activities." *Id.* at 1206.

In the case at bar, Defendant is both directly and indirectly attempting to collect a debt from Ms. Polanco for the same reasons it is directly and vicariously liable under the FDCPA, as explained in Plaintiff's moving papers. *See* Pl. MSJ pp. 8, 15-17. A principal is liable for the acts of its agents operating in the course and scope if their agency.

What NCOP really seems to be arguing is whether it may be vicariously liable without a holding that it controlled the acts of its agents, NCOF and MSH. This assumes, arguendo, NCOP's argument that it is a separate entity from NCOF, as opposed to, say, a joint venture. This also assumes NCOP is not directly liable.

Debt collection creditors (debt buyers) have repeatedly been held to be liable for debt collection violations they commit through its debt collection law firm in collection lawsuits, and without any discussion about the need to demonstrate control. *Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 428 (S.D.N.Y. 2010)(Plaintiffs state FDCPA, GBL 349, and judiciary law claims by alleging that a debt collector creditor, through its debt collection law firm, regularly used robo-signed affidavits of merit falsely claiming personal knowledge in order to obtain default judgments; and for using false affidavits of service to obtain default judgments to garnish wages and freeze bank accounts); *Diaz v. Portfolio Recovery Associates, LLC*, 2012 WL 661456 * 13,14 (E.D.N.Y. Feb. 28, 2012) (M.J. Pollak) *report and recommendation adopted*, 2012 WL 1882976 (E.D.N.Y. May 24, 2012) (J. Brodie)(Plaintiffs state FDCPA, GBL 349, and NY Judiciary Law 487 claims by alleging a debt collector creditor, through its debt collection law firm, robo-signed debt collection lawsuits without meaningful attorney review, and for doing so to collect time barred debts); *Fritz v. Resurgent Capital Servs.*, LP, 955 F. Supp. 2d 163, 173

(E.D.N.Y. 2013)(Plaintiffs state FDCPA and GBL 349 claims for alleging a debt collector creditor, through its debt collection law firm, filed collection lawsuits falsely claiming the creditor owned the putative debt when it did not, for representing on the collection complaint that the creditor had a debt collection license when it did not, and for misidentifying the creditor in written communications). Just as in *Sykes*, *Diaz*, and *Fritz*, NCOP, through its debt collection servicer NCOFS, and through its debt collection law firm MSH violated the FDCPA, and through their servicer NCOFS violated state law, here the tort of conversion.

As argued in Plaintiff's motion, Pl. MSJ p. 15, NCOP is directly liable for the acts it takes as a *party* to the collection lawsuit. As a corporation, NCOP must appear in NY Civil or Supreme Court only through an attorney. *See* N.Y. C.P.L.R 321(a) (prohibiting corporations from bringing suit other than through counsel). Thus the acts taken during the debt collection lawsuit are necessarily the acts of the corporate party. Further, NCOP, as the client, necessarily has the right to control its outside law firms. NY Professional Disciplinary Rule 1.2(a) (client's control over his counsel as a matter of right).

Further, under basic agency rules the NCOP is vicariously liable for the actions the NCOFS and Harris took on their behalf. "[T]raditional vicarious liability rules ordinarily make principals liable for acts of their agents merely when the agents act in the scope of their authority". *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 508 at 517 (S.D.N.Y. 2013), *citing Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003)(internal quotations omitted). While the attorney-client relationship emphasizes agency liability, such liability does not turn on an attorney client relationship. For example, vicarious liability has been found even outside the attorney-client relationship.

*Okyere I* rejected the exact argument NCOPS is making here. "As Palisades notes, the complaint makes no allegations that it took any action with respect to the violations alleged in the complaint other than engaging the Houslanger Defendants represent it in court. As a result, Palisades argues that it cannot be liable for the acts of the Houslanger Defendants. This argument is rejected." There are strong policy reasons to follow *Okyere I*. As described in *Okyere I*, "a debt collector subject to the FDCPA should bear the burden of monitoring the activities of those it enlists to collect debts on its behalf", citing *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 405 (3d Cir.2000)(quotations omitted). Otherwise, there is little incentive for large debt collectors to hire law-abiding contractors. Since publication in March 2013 however, *Okyere I* has been repeatedly adopted by courts throughout the country regarding per se vicarious liability.

Should the Court require a consumer to prove control by the principal over the agent in order to impose vicarious liability, incentivize a high net worth debt buyer to hire unscrupulous contractors and turn a blind eye to the latter's conduct. That is, high net-worth debt collectors can hire undercapitalized entities to collect on their behalf, escaping liability for any illegal conduct which ensues. The result runs contrary to a central purpose of the FDCPA: to "eliminate abusive debt collection practices by debt collectors, to *insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged*, and to promote consistent State action to protect consumers against debt collection abuses. 15 U.S.C.A. § 1692 (emphasis added).

The potential for abuse is particularly great in the FDCPA class action context. In class actions, the FDCPA puts a cap on damages "not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector". 15 U.S.C.A. § 1692k. In the case at bar, for example, NCO testified that it had an annual revenue of $1.7 billion. DE 68, Pl. 56.1 ¶ 14. In contrast, the

MSH, a small debt collection law firm, would be expected to have a low net worth, making worthless a class recovery under the 1 percent net worth cap for FDCPA class action. Adoption of NCOP's contention would eviscerate the FDCPA class action mechanism. High net worth debt collectors set up a "hear no evil, see no evil, speak no evil" structure to immunize themselves from the FDCPA class action violations.

Even if NCOP were held not to be a debt collector, that does not necessarily mean it would not be vicariously liable for FDCPA damages. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000) (Under state partnership law, a partner of a debt collection partnership is jointly and severally liable for the FDCPA violations of the partnership, even if that partner is not a debt collector); and *Peter v. GC Services, LP*, 310 F.3d 344, 353 (5th Cir.2002) (same).

### C. RESPONSE TO POINTS III: Settlement with Harris does not release claims against NCOP.

NCOP argues, "Plaintiff settled her claims with MSH [Mel S. Harris & Associates, LLC], but is now seeking to hold NCOP vicariously liable for MSH's alleged wrongdoing, in an amount above and in addition to what plaintiff has already received from MSH. Plaintiff, after obtaining a settlement from MSH, "has reduced the value of [her] claim to a monetary amount. Allowing such a plaintiff to proceed against the principal on the same exact claim would amount to a double recovery." DE 65, Def. MSJ p. 19, *quoting Nelson v. Cavalry Portfolio Servs., LLC*, No. 09-CV-00677-PAB-MJW, 2010 WL 1258045, at *2 (D. Colo. Mar. 24, 2010).

*Nelson*, the sole case cited by NCOP, involved a very different fact pattern than the case at bar. In *Nelson*, debt collector Cavalry Portfolio Services ("CPS"), the principal, hired debt collector National Action Financial Services ("NAFS"), the agent, to collect the debts of the former. *Nelson* sues NAFS for violating the FDCPA while collecting for CPS. NAFS tendered an offer of judgment, but, before accepting, Plaintiff amended suit to add CPS as a defendant solely on the basis of vicarious liability. Plaintiff accepted the offer of judgment. CPS filed a motion to dismiss. Judgment was entered on the rule 68 offer of judgment, the judgment was satisfied, and a satisfaction of judgment was filed. The Court then granted CPS's motion to dismiss.

Plaintiff's claims are entirely distinguishable from Nelson for several reasons. First, in *Nelson* the claimed liability and damages between the agent and the principal overlapped entirely. All of the liability of the principal was vicarious of that of the agent. Not true here. NCOP is correct in its moving papers that there is overlap on in claim: NCOP and Harris are jointly and severally liable for their use of false affidavits of service to obtain default judgment. *See Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 428 (S.D.N.Y. 2010)(Plaintiffs state FDCPA claims for which relief may be granted by alleging that a debt collector creditor, through its debt collection law firm, regularly used robo-signed affidavits of merit falsely claiming personal knowledge in order to obtain default judgments; and for using false affidavits of service to obtain default judgments to garnish wages and freeze bank accounts).

However, there are claims against NCOP that arise from the time period after Harris was terminated. Specifically, all the attempts by Ms. Polanco to have the sewer-service default judgment vacation and her money returned were for the period of time after NCO terminated Harris. Therefore, those damages are solely on NCO, including the actual and punitive damage claims for conversion.

Second, *Nelson* turned almost exclusively on the fact that there was a *judgment* against the agent, and that judgment had been satisfied, but that the Plaintiff sought to add the principal based solely on vicarious liability for the exact same conduct. That is not the concern here. Both Harris and NCOP were sued contemporaneously and, more importantly, there was never a judgment against Harris. The Nelson court was concerned about the risk of inconsistent judgments between the principal and the agent for the same conduct. There is no risk of that here as the sole judgment would be rendered against NCOP. Further, the Court noted the general disallowance of suit against the principal after there has been a suit against the agent than the judgment against the agent has been satisfied. Again, there is no judgment against Harris.

Third, the "so ordered" dismissal explicitly stated, "This dismissal does not prejudice plaintiff's right to continue this action against remaining defendant NCO Portfolio Management, Inc." DE 13 ¶ 2. (So ordered stipulation of dismissal).

Fourth, *Nelson*, raised the concern of double recovery, but specifically only in the context of where a judgment has already *adjudicated* the monetary amount and the plaintiff is seeking an additional amount from the principal. *Id.* at * 2. As there is no judgment against Harris, this argument is not applicable. Nelson makes a related argument that "indemnification duties between an agent and a principal could result in double payment." *Id.* There is no right to indemnification or contribution for FDCPA claims, however. Whether a defendant who incurs liability under a federal statute may pursue either contribution or indemnification is a question of federal law. *Zino Davidoff SA v. Selective Distribution Intern. Inc.*, 2013 WL 1245974 *4-5 (S.D.N.Y. Mar. 8, 2013). However, "neither the FDCPA nor its sister act, the Fair Credit Reporting Act, has been found to support an express or implied right to indemnity or contribution…" *Conner v. Howe,* 344 F.Supp.2d 1164, 1171 (S.D. Ind. 2004)(collecting cases). *See also Cintron v. Savit Enterprises,* 2009 WL 971406 *2 (D.N.J. Apr. 8, 2009)("[C]ourts, when faced with the issue whether the FDCPA or the FCRA provides for an implied right of indemnification, have found that both laws create comprehensive regulatory schemes, leaving no room for a court to infer a right to contribution or indemnification."). . Moreover, such indemnification would conflict with the statutes' purposes because it could, if successful, relieve the defendants of the obligations that they owe to plaintiff under the statutes. *Anderson v. Nelson,* 2010 WL 4884670 *5-6 (D. Minn. Nov. 4, 2010). It would also be a windfall to the debt collector. *Pickard v. Lerch*, 2005 WL 1259629 *5 (S.D. Ind. 2005) ("It would be unjust for this Court to reward Wright by giving it a setoff based on Calvary's independent FDCPA-related actions and settlement with Pickard.").

### D. RESPONSE TO POINTS IV: Plaintiff states a claim for conversion as this Court has already held [DE 52].

Defendant makes two arguments here. First, it repeats its argument that it is not liable for conversion because the acts were taken by its servicer, NCOF. That argument fails because, even if true, under principles of agency NCOP, the principle, is liable for the acts NCOF takes on its behalf within the course and scope of the agency relationship. NCOP also argues that the money was being held by NCOFS. There is no evidence in the summary judgment record as to who had the money, just that it was returned by NCOF. That is immaterial. NCOF was the agent of NCOP and holding the money for the benefit of NCOP, assuming it did not actually transfer the funds. In *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522 (S.D.N.Y. 2013) (*Okyere II*), Palisades (the debt buyer creditor) and its debt collection law firm (Houslanger) made the same argument: the wrongfully garnished and wrongfully kept money was actually in the possession of the Marshal. The Court rejected this argument because the Marshal was the agent of Palisades and Houslanger, and was holding the money for their benefit.

Second, Defendant simply restates the arguments as to why the conduct at hand did not constitute conversion. They have already lost that argument when they opposed the motion to amend. There are no additional facts that change that conclusion.

### E. COUNTER-POINT: NCOP DOES NOT MOVE FOR SUMMARY JUDGMENT SPECIFICALLY ON THE SEWER SERVICE CLAIM

It should be noted that NCOP does not deny that entering a judgment based on a sewer service affidavit constitutes an FDCPA violation. Should the Court reject NCOP's argument that it is not directly or vicariously liable, then the Court should enter summary judgment against NCOPS on this point. *See Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 428 (S.D.N.Y. 2010). NCOP would be liable on this point because of ratification even if it somehow escaped direct or vicarious liability for the initial use of the false affidavit of service to enter default judgment. When Ms. Polanco filed her state court order to show cause and stated the factual basis of sewer service, NCOP took no steps to determine whether the allegations were true. Instead attempted to retain the fruit of the poison tree, making it liable by ratification. *See* Restatement (2d) of Agency 88, 99.

## V. CONCLUSION

For these reasons, Plaintiff prays the court deny Defendant's motion for summary judgment and to allow this case to proceed to trial.

New York

Respectfully submitted,
*/s/*
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## CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Defendant NCO Portfolio Management, Inc.
by and through its attorney of record
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January 27, 2015
/s/
Ahmad Keshavarz